Semesta Insurance Underwriting Agency Sdn Bhd v Koperasi Insuran (M) Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5-22-225 OF 1995
STEVE SHIM J
25 FEBRUARY 1999

Civil Procedure *— Pleadings — Amendment of — Statement of claim — Trial part heard and ordered to commence de novo — Application to amend statement of claim made after order for trial de novo but before fresh trial commenced — Whether amendments to be considered amendments made in the course of the trial — Whether amendments would change character of suit*

The plaintiff's suit had come up for hearing on three occasions and three witnesses had testified. The trial judge was then transferred and the case was ordered, at the request of the parties, to be heard *de novo*. While waiting for the case to be heard *de novo* and based on the testimony of the earlier witnesses, the plaintiff applied to amend its statement of claim. The defendant, in opposing the application argued that: (i) the application was made too late, in the course of the trial and was not bona fide; and (ii) the amendments would have the effect of changing the character of the suit. The senior assistant registrar allowed the amendments and the defendant appealed.

Held, dismissing the appeal:

(1) The amendments were not made in the course of a trial as there already existed an order directing the case be heard *de novo* (see p 644B).

(2) The mere fact that there had been a substantial delay in making the amendments was no ground for disallowing the amendments unless the delay had resulted in prejudice to the defendant. No prejudice has been established in this case (see p 644C).

(3) The proposed amendments were founded on substantially the same basis which had remained intact throughout and would substantially clarify the issues in dispute (see p 644G).

[Bahasa Malaysia summary

Guaman plaintif telah tiba sebanyak tiga kali untuk perbicaraan dan tiga orang saksi telah memberi keterangan. Hakim perbicaraan telah kemudiannya dipindahkan dan kes tersebut telah diperintahkan, atas permintaan pihak-pihak tersebut, supaya didengar *de novo*. Sementara menantikan kes tersebut didengar *de novo* dan berdasarkan keterangan saksi-saksi yang terdahulu, plaintif telah memohon untuk meminda pernyataan tuntutannya. Defendan dalam membantah permohonan tersebut berhujah bahawa: (i) permohonan tersebut telah dibuat terlalu lewat dalam perjalanan perbicaraan tersebut dan tidak bona fide; dan (ii) pindaan-pindaan tersebut akan mempunyai kesan

menukar sifat guaman tersebut. Penolong kanan pendaftar telah membenarkan pindaan-pindaan tersebut dan defendan telah merayu.

Diputuskan, menolak rayuan tersebut:

(1) Pindaan-pindaan tersebut tidak dibuat dalam perjalanan sesuatu perbicaraan kerana telahpun wujud satu perintah yang mengarahkan kes tersebut didengar *de novo* (lihat ms 644B).

(2) Fakta bahawa terdapatnya kelewatan yang substansial dalam membuat pindaan-pindaan tersebut tidak merupakan alasan untuk tidak membenarkan pindaan-pindaan tersebut kecuali kelewatan tersebut telah menyebabkan kemudaratan pada defendan. Tiada kemudaratan yang telah dibuktikan dalam kes ini (lihat ms 644C).

(3) Pindaan-pindaan yang dicadangkan telah diasaskan secara substansialnya atas dasar-dasar yang sama yang telah kekal dan tidak diganggu sepanjang masa dan akan secara substansialnya menjelaskan isu-isu yang dipertikaikan (lihat ms 644G).]

Notes

For cases on amendment of statement of claim, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 338–341.

Cases referred to

Ketteman & Ors v Hansel Properties Ltd & Ors [1987] AC 189 (refd)

Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213 (refd)

Christie Soosay Nathan (*Christie Soosay Nathan & Associates*) for the plaintiff.

Cecil Abraham (*Satha & Co*) for the defendant.

Steve Shim J: This is an appeal by the defendant against the decision of the learned senior assistant registrar ('SAR') in allowing with costs the application by the plaintiff to amend its statement of claim as per encl 89. A brief description of the events leading to this application is illuminating.

On 8 May 1995, the plaintiff commenced this suit against the defendant. The case eventually came up for hearing before Kamalanathan Ratnam J on 17 May 1996, 27 June 1996 and 4 July 1996, in the course of which three witnesses for the plaintiff had given evidence. Before the next hearing date however, the learned judge was transferred to another division of the High Court. The case was then ordered, at the request of all the parties concerned, to be heard *de novo*. Whilst waiting for the case to be heard *de novo*, the plaintiff on 18 November 1997 filed this application to amend its statement of claim (encl 89). This, as I said, was heard by the learned SAR on 2 December 1997 who allowed the application with costs.

Hence this appeal.

The application at encl 89 has been opposed by the defendant. Essentially, the thrust of the defendant's opposition is two-fold, namely: (i) that the amendments sought for by the plaintiff are not bona fide; and (ii) that the amendments have the effect of turning the suit from one character into a suit of another and inconsistent character. Let me deal with them separately. At the outset, it is important to bear in mind the relevant legal principles involved. Here, I need merely refer to that part of the judgement of Mohamad Azmi FJ in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 at p 214 which reads:

> Under O 20 of the Rules of the High Court 1980, which is equivalent to O 28 Rules of Supreme Court, a Judge has a discretion to allow leave to amend pleadings. Like any other discretion, it must of course be exercised judicially (see *Kam Hoy Trading v Kam Ratt Tin Mine*). The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is bona fide; (2) whether the prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character (see *Mallal's Supreme Court Practice* PMQ 342) if the answers are in the affirmative, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even if the event of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the original statement of claim.

Clearly therefore what is of fundamental importance is to consider the justice of the case. This appears to encompass a wide range of factors not possible of enumeration. This is what Lord Griffiths has to say in *Ketteman & Ors v Hansel Properties Ltd & Ors* [1987] 1 AC 189.

> Whether an amendment should be granted is a matter for the discretion by the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear upon the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. Furthermore to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different deface.

It is in the light of the above principles that I now proceed to deal with the issues raised by the defendant. First, as I have said, the defendant has alleged that the amendments are not bona fide for the following reasons: (a) that they constitute, in effect, an attempt by the plaintiff to rectify defects in its statement of claim; defects which have apparently surfaced in the cross examinations of its witnesses during the course of the trial before

Kamalanathan Ratnam J; (b) that they are made in the course of trial; and (c) that there is substantial delay in making the amendments. Let me say that after having carefully and thoroughly examined the notes of evidence as against the pleadings in the statement of claim and the proposed amendments, (a more in depth exercise than I did when considering the application in encl 108), I do not accept that there has been an attempt by the plaintiff to rectify defects as alleged by the defendant. Nor do I find any justification in the defendant's allegation that the amendments are made in the course of trial since there is in existence a court order expressly directing that the whole case be heard *de novo*. This, in effect means that there will be a fresh trial of the action. It is not disputed that the said amendments have been made prior to the fresh trial. It has also to be noted that the mere fact that there has been a substantial delay in making the amendments is no ground for disallowing the said amendments unless they have resulted in prejudice to the defendant. No prejudice has been established in this case. Indeed there is none. In the circumstances, I do not think that the issue of the absence of bona fide has any merit whatsoever.

Secondly, it has been alleged that the amendments have resulted in changing the character of the suit. According to counsel for the defendant, by virtue of the amendments, the plaintiff is seeking to alter the capacity in which it has brought the writ, from that of an underwriting agent to that of an insurance agent and consultant, and has further introduced new causes of action such as malicious prosecution and libel giving rise to fresh reliefs in the forms of aggravated, punitive and exemplary damages and costs, etc. Having taken a closer look at the proposed amendments, I have to say that they are essentially related to the consequences that allegedly flow from a series of events commencing from the setting aside of the judgment in default obtained by the defendant against the plaintiff to the dismissal of the winding up petition taken up by the defendant against the plaintiff, and culminating in the final withdrawal of the court action by the defendant against the plaintiff. Arising from these events, the plaintiff has alleged negligence, malicious prosecution and libel resulting in alleged general damages, punitive and exemplary damages, interests and costs. Quite clearly, the proposed amendments are founded on the same or substantially the same factual basis which have remained intact throughout. In my view, the proposed amendments are to substantially clarify the issues in dispute. In the circumstances, I am unable to accept the proposition that they have precipitated in changing the character of the suit. That has no merit whatsoever.

For the reasons given, I will uphold the decision of the learned SAR in allowing the application in encl 89. Accordingly, I dismiss the appeal with costs.

Appeal dismissed.

Reported by Andrew Christopher Simon